McKenzie Engineering Co. *and* Carpenters Local Union 410, United Brotherhood of Carpenters and Joiners of America, AFL–CIO. Case 33–CA–11408

September 28, 2001

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS TRUESDALE AND WALSH

On July 20, 2001, Administrative Law Judge Marion C. Ladwig issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the administrative law judge.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

ORDER

1. The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, McKenzie Engineering Co., Fort Madison, Iowa, its officers, agents, successors, and assigns shall take the action set forth in section (a) of the Order by paying the discharged union employees the amounts listed next to their names for a total of $130,515.79, plus interest, and in section (b) of the Order by paying the nonunion replacement employees the amounts listed next to their names for a total of $70,091.06, plus interest.

2. Backpay and loss of benefits shall continue to accrue for, and on behalf of Fred Arnold, Donald Patterson, and Mark Spiekemeier until such time as Respondent McKenzie Engineering, Co. makes a valid offer of reinstatement to them.

Deborah A. Fisher, Esq., for the General Counsel.
David J. Lauth and *Matthew E. Klein, Esqs. (Dorsey & Whitney),* of Minneapolis, Minnesota, for the Respondent.
Marc M. Pekay, Esq., of Chicago, Illinois, for the Charging Party.

SUPPLEMENTAL DECISION

MARION C. LADWIG, Administrative Law Judge. This compliance proceeding (in which the compliance specification and notice of hearing was issued December 1, 1999, and a hearing was held November 6–7, 2000) involves solely an appropriate remedy in the current case, referred to below as *McKenzie 1*.

Therefore, the decision by the Federal circuit court in the subsequent ERISA case, discussed below, and the next subsequent decision by the Board in *McKenzie 2*, also discussed below, are irrelevant to the issues in this proceeding.

1. Current case remedial issues

In *McKenzie Engineering Co.*, 326 NLRB 473 (1998) (*McKenzie 1*), enfd. *McKenzie Engineering Co. v. NLRB*, 182 F.3d 622 (8th Cir. 1999), the Company—previously a long-standing union contractor—discriminatorily discharged four members of Carpenters Local 410 on November 1, 1995, in violation of Section 8(a)(3) and (1) of the Act and hired nonunion replacements. The union members were journeymen Fred Arnold Jr., Donald Patterson, and Mark Spiekermeier and apprentice Steven Perry. They were performing marine construction work, assisting two operating engineers and a boilermaker on a project to repair an icebreaker structure on the Union Electric dam in the Mississippi River near Keokuk, Iowa. The Board (326 NLRB at 474) ordered the Company to offer them full reinstatement and make them whole for lost earnings and other benefits.

To remedy the violations of Section 8(a)(5) and (1), the Board (326 NLRB at 474) ordered the Company to

> Honor the collective-bargaining contract . . . including paying contractual wage rates, making contractually required contributions to fringe benefit funds . . . and make whole all employees . . . and fringe benefit funds, with interest, for any losses they may have suffered as a result of the failure to honor the collective-bargaining agreement.

Enforcing *McKenzie 1*, the 8th Circuit Court (182 F.3d at 625–626) rejected the Company's contention that its collective-bargaining agreement with Local 410 did not include the type of construction work involved in the Keokuk icebreaker project.

The court concluded, based on the Board's credibility findings (182 F.3d at 627–628), that sufficient evidence existed to support NLRB's finding that the Company fired the four union members "in furtherance of a plan to withdraw recognition from the union," violating Section 8(a)(1) and (3). The court rejected the Company's contentions that it fired Arnold and Perry "because they failed to show up for work" on the morning of November 1, 1995, and fired Patterson and Spiekermeier "because they engaged in a 'work stoppage' at the construction site that same [rainy] day." It held (at 629) that "At the compliance proceeding, [the Company] will have a full opportunity to litigate the appropriateness of the NLRB's remedy and to avoid the reinstatement obligation altogether by showing that the union carpenters would not have been hired for work on subsequent projects," citing *Dean General Contractors*, 285 NLRB 573, 573–575 (1987).

In this compliance proceeding, the Company admitted that it "moved employees from job to job," its counsel emphasizing, "[L]et me be absolutely clear. That is undisputed." (Tr. 121.)

The Company, in Fort Madison, Iowa, is a small marine construction company, working along the Mississippi River. President Robert McKenzie testified that he usually has five to seven employees and that about 98 percent of the time he has only one project. Since becoming incorporated in 1986, the Company "has been a party to several successive collective-

bargaining agreements with the union." (Tr. 172; 182 F.3d at 626.)

The most recent of these 8(f) agreements was with the "Northwest Illinois & Eastern Iowa District Council [now Heartland Regional Council] of Carpenters (Union), for and on behalf of Carpenter Local Union 410," in force from May 1, 1994 through April 30, 1997 (GC Exh. 4, 5 and Exh. 11 p. 2 fn. 3, 333 NLRB 905, 909 fn. 3 (2001)).

Local 410 Business Agent Jim Decker, whose office is also in Fort Madison, credibly testified that his 60 or 70 members work "Quite a bit" in the Quad Cities and "all over where the work is to be had." He also credibly testified that when contractors in his area do work in the other areas (in the jurisdiction of other regional council locals), "they take local people" with them and pay the fringe benefits back in his area—indicating that the Local 410 members continue to work under Local 410's collective-bargaining agreement when working in the Quad Cities area. In practice, as Decker further credibly testified, there was no "limitations on carpenters . . . working at a different area within the regional council." (Tr. 267–269.)

The $2.27 an hour in fringe benefits ($2.15 for the pension fund and 12 cents for the apprentice fund) are sent by Local 410 to the Carpenters Fringe Benefit Funds in Chicago (Tr. 268; GC Exh. 22). All dues are sent by Local 410 to the regional council (Tr. 157).

McKenzie testified that he has worked with members of Local 410 for "Most of my career, off and on," that he has been associated with Local 410 "certainly . . . in the Quad Cities area," and "I've done 15, 20 percent of my work in my lifetime in the Quad Cit[ies] area or about north of there" (Tr. 211–212).

In the ERISA case (the first subsequent case, discussed below), President McKenzie testified at the Federal district court's trial (GC Exh. 10 in this compliance proceeding) about the work performed by the four Local 410 members on the Keokuk icebreaker project. Although McKenzie testified that laborers and ironworkers also perform such construction work, he employed only union carpenters to assist the operating engineers and a boilermaker. (Tr. 19–21; GC Exh. 10, pp. 85, 89, 122, 124.)

When McKenzie was asked whether Local 410 Business Agent Jim Decker ever said he "didn't think his people should be doing the work because it wasn't covered by the [Local 410] contract," McKenzie admitted (GC Exh. 10 p. 125):

> A. No, I didn't discuss it in those terms. Originally when I met with Jim Decker, I told him what the job consisted of, how people had to work together as a team, that it would behoove both of us not to bring in a whole bunch of different unions . . . *four unions is unbearable. . . . I don't need to have a whole bunch of guys claiming work*, and the business agent for the ironworkers is up in Burlington. I don't even know his name. And the laborers' business agent I don't know, so you sort of go with who you know. [Emphasis added.]

McKenzie testified that the three journeyman carpenters did "a little of everything" and the apprentice "did the same work basically that everyone else did" (GC Exh. 10, pp. 85, 88).

McKenzie admitted in the district court (GC Exh. 10 pp. 125–126) that he would have "used these [Keokuk-project union] people on the Crescent Bridge job" in Davenport, Iowa (one of the Quad Cities), contrary to his contention in this compliance proceeding that the Quad Cities area was too far from Fort Madison (where the Company's office is located) for them to travel there to work, as discussed below.

I note that (a) after McKenzie admitted in the district court that he would have used the union carpenters on the Crescent Bridge job and (b) after testifying in this proceeding, as discussed above, that he had been associated with Local 410 "certainly . . . in the Quad Cities area," having done "15, 20 percent" of his work in his lifetime in that area or about north of there, he then gave conflicting testimony.

When asked "was there ever a member of Local 410 who traveled that far to work on a project for you?" he first gave the evasive testimony, "I don't believe so, no." Then when asked if he was saying that "no members of Local 410 ever worked in the Quad Cit[ies] area," he positively answered, "For me? Yes, that's what I'm saying"—despite his preceding testimony about been associated with Local 410 certainly in the Quad Cities area. (Tr. 212.)

The Company ignores in its brief this conflicting testimony and gives no explanation how the Company would be associated with Local 410 in the Quad Cities area, in the jurisdiction of Local 166, unless Local 410's members were assigned there. I discredit McKenzie's denials.

2. Court Ruling in ERISA Case Irrelevant

In *Carpenters Fringe Benefit Funds of Illinois v. McKenzie Engineering*, 217 F.3d 578, 580–581 (8th Cir. 2000) (the ERISA case, R. Exhs. 3 and 13)—in which the General Counsel of the Board was not a party—the Carpenters' Benefit Funds, Local 410, and Local 166 in Rock Island, Illinois (one of the Quad Cities), brought an action in the Federal district court under ERISA and Section 301 of NLRA for unpaid contributions to the pension fund and the apprenticeship training fund.

That case arose after the Company on November 23, 1996, assigned its nonunion replacement crew to work on the Crescent Bridge job in Davenport (across the Mississippi River from Rock Island). That was a year after the Company discriminatorily discharged its union carpenters on November 1, 1995, from the Keokuk icebreaker project and hired nonunion replacements (as held in *McKenzie 1*, above).

The replacement employees, working in the jurisdiction of Local 166, were neither union carpenters represented by a sister local (Local 410) in the Carpenters' Heartland Regional Council, nor members of Local 166 or any other union. When Heartland Regional Council Business Agent Paul Delcourt was advised on December 12, 1996 that the Company's replacement employees were nonunion, he sought on behalf of Local 166 to apply the Carpenters' 1996–2001 highway and heavy construction contract to the work. See GC Exh. 11 pp. 9–10, cited in the Company's brief (at 5).

The circuit court in that ERISA case, emphasizing that it was relying on the record before it, held (217 F.3d at 584–585):

> [W]e conclude the record will not support a finding that any Crescent Bridge work was covered by a collective bargaining agreement with the Carpenters, as opposed to the Operating Engineers. . . . Local 150 [of the Operating Engineers] was willing to cover those workers under its collective bargaining agreement, using a work permit mechanism. On this record, [the Company] was contractually free to assign the Crescent Bridge work to either union, or part of the work to each union.

Thus, as the court emphasized, it was ruling solely on the record in that case (in which the Board was not a party). The court was therefore ruling on an issue whether the Company was contractually free to assign the nonunion replacements' work on the Crescent Bridge job to either Carpenters Local 166 or Operating Engineers Local 150, "or part of the work to each union."

That clearly is not an issue in this compliance proceeding.

In this proceeding, the assignment of nonunion replacements' work is irrelevant. In the absence of the unlawful discharge of the Local 410 members, the issue of assigning work of nonunion replacements on the Crescent Bridge job to other locals would never have arisen.

As President McKenzie admitted, he would have used the Local 410 members on the Crescent Bridge job.

The evidence is clear that (a) in the absence of the unlawful discharge of the Local 410 members, these union carpenters would have been assigned to work on the Crescent Bridge job, in the jurisdiction of the sister Local 166 of the Carpenters' Heartland Regional Council and (b) they would have worked under Local 410's May 1, 1994, to April 30, 1997, collective-bargaining agreement with the Company.

In practice, as found, there was no limitations on carpenters working anywhere within the regional council. When local contractors in Local 410's geographic jurisdiction assigned Local 410 members to work in the jurisdiction of other regional council locals, the contractors would work under Local 410's contract and pay the fringe benefits back in Local 410's area. Local 166 had never claimed jurisdiction over work performed by Local 410 carpenters in the Quad Cities.

The circuit court's ruling on the Benefit Funds issue is also irrelevant.

Reversing the judgment of the district court, the circuit court ruled (217 F.3d at 585–586) that the Benefit Funds "failed to prove that [their] audit report as modified by the district court establishes a claim for contributions contractually owed by [the Company] under collective-bargaining agreements with the Carpenters and it local unions" and that the auditor's "bare report is insufficient to establish breaches of the collective bargaining agreements."

In footnote 2 (217 F.3d at 585), however, the court specifically ruled that its decision was irrelevant to the issues in this compliance proceeding regarding the Company's contractual obligation to make Benefit Fund contributions for work covered by the Local 410 Agreement, ruling as follows:

> We note that our decision rejecting the claim for contributions to the Funds is narrow. The NLRB [in *McKenzie 1*] has determined that [the Company] committed an unfair labor practice in firing four Local 410 carpenters from the Keokuk project. The Board's compliance proceedings, which are not yet complete, will no doubt result in a backpay award for those employees, and that award may well include pension contributions to the Funds on their behalf. Unlike the Funds' overbroad claim in this case, that type of award would clearly be consistent with McKenzie's contractual obligation to make contributions for work "covered by [the Local 410] Agreement."

3. Board ruling in *McKenzie 2* case irrelevant

In *McKenzie Engineering Co.*, 333 NLRB 905 (2001) (*McKenzie 2*), the Board also ruled on contractual coverage of the nonunion replacement employees who worked on the Crescent Bridge project—not on contractual coverage of the Local 410 members on that project if they had not been unlawfully discharged.

Based on the record in that case, the Board held (id. at 906) that by virtue of the Company's 1988 Section 8(f) "[memorandum] collective-bargaining agreement with the Northwest Illinois and Eastern Iowa District Council of Carpenters (the Carpenters Union)" (GC Exh. 15 p. 29), it was "bound by the 1996–2001 heavy and highway construction contract between the Associated General Contractors of Illinois and the United Brotherhood of Carpenters and Joiners of America and that this agreement was applicable to the Crescent Bridge repair project." The Board therefore held that the Company "violated Section 8(a)(5) and (1) of the Act by failing and refusing to honor this collective-bargaining agreement with respect to the Crescent Bridge project."

The Board (id.) ordered the Company to "Honor all terms of the [1988] memorandum agreement and its incorporated collective-bargaining contracts" and "Make whole all employees, Heartland Regional Council . . . and fringe benefit funds . . . for work performed on the Crescent Railroad Bridge Sheer . . . between December 9, 1996 and March 26, 1997, with interest on amounts owing."

That Board decision, of course, is irrelevant to the issues in this compliance proceeding.

As indicated, this proceeding involves an appropriate remedy after the Company unlawfully discharged the Local 410 members and failed to assign them to work on the Crescent Bridge job under the Carpenters Local 410 contract.

Compliance Specification

The amended paragraph 3 of the compliance specification (GC Exh. 19) states that the number of hours the four union employees would have worked "is based on the number of hours worked by the employees who replaced them." It alleges that because of the Company's employment practice of retaining or rehiring employees from job to job, they would have continued to work. It further alleges that in the absence of valid offers of reinstatement, (1) contributions for their fringe benefits continued to accrue through April 30, 1997, (2) backpay for Steven Perry continued to accrue through the date of his death on October 21, 1999 (Tr. 43; GC Exh. 20), and (3) backpay for Fred Arnold Jr., Donald Patterson, and Mark Spiekermeier continues to accrue through the present.

In the compliance hearing on November 6–7, 2000, the Company stipulated—subject to its defenses (Tr. 36, 38) that backpay should not be awarded for various periods of time—

> (1) that the methodology used in calculating the compliance specification was reasonable (Tr. 24–25, 29),
>
> (2) to the gross backpay numbers, interim earnings, net backpay, and fringe benefits for the four discharged union members (Tr. 24, 27; GC Exhs. 16A–D),
>
> (3) to the net backpay (computed by subtracting gross nonunion backpay from the contractual backpay) and fringe benefits for the nonunion replacements (Tr. 25, 27; GC Exh. 17), and
>
> (4) that the General Counsel has met the burden of showing the gross backpay (Tr. 28–29).

The compliance specification is summarized in General Counsel exhibit 21 for the backpay and fringe benefits of both the four discharged union employees and the total of 19 nonunion employees shown in the compliance specification to have replaced them through April 30, 1997 (Tr. 43, 182; GC Exh. 17).

For the union employees, GC Exh. 21 summarizes GC Exhs. 16A-D, showing the compliance specification of backpay (Tr. 49–50, 57, 74–75) through the last quarter of 2000 (the fourth quarter being merely an agreed estimate, subject to later verification, Tr. 33–38), as well as fringe benefits to the second quarter of 1997 (until the Sec. 8(f) union contract terminated April 30, 1997).

The total backpay due the four discharged union employees (the net backpay after deduction of the net interim earnings, plus $22,506.35 in interest to November 6, 2000) are shown in GC Exh. 21 as follows:

> Fred Arnold Jr. $9,730.38, Donald Patterson $75,695.49, Mark Spiekermeier $44,182.06, and Steven Perry $7, 771.52, totaling $137,379.45.

The total fringe benefits through April 30, 1997, payable to the fringe benefit funds on behalf of the three union journeymen, are shown in GC Exh. 21 to be $15,642.68. This brings the total backpay and fringe benefits to $153,022.13.

The total backpay due the 19 nonunion replacements, as shown by GC Exh. 21, summarizing GC Exh. 17 covering the period through April 30, 1997, amounts to $61,833.96 (including $13,431.64 in interest to November 6, 2000). The total fringe benefits for the same period amount to $21,688.72, totaling $83,522.68 (Tr. 39–41, 51, 56, 58–59, 62; R. Exh. 1).

Thus the stipulated methodology used in calculating the compliance specification, meeting the General Counsel's burden of showing the gross backpay, produced the compliance specification of backpay and fringe benefits of $153,022.13 for the four discharged union members and $83,522.68 for their 19 nonunion replacements, totaling $236,544.81 through 2000—but of course not any amounts accruing after that date.

The Company contends in its brief (at 3 and 9) that "The remedies sought by the General Counsel are unreasonable in light of the issues and evidence at the hearing," that the "backpay and back benefit contribution awards should be significantly reduced," and that the remedies sought reach "results that are more punitive than remedial."

Company's Defenses

1. Work Performed by nonunion replacements on lock 19

The Company contends in its brief (at 17–19) that "[b]ecause the Company would not have hired carpenters to perform" the work, the discharged union carpenters are not entitled to backpay for work performed by nonunion replacements on the Army Corps of Engineers lock 19 project for the weeks ending February 24 to March 16, 1996 (GC Exh. 18 p. 1). That was during the time that the Company's icebreaker project near Keokuk was shut down from December 7, 1995 to March 19, 1996, because of freezing of the river. The Company does not contend that the union carpenters were unqualified to perform the work assisting the operating engineer, boilermaker, and President McKenzie on that project.

The Company contends in its brief (at 18) that "the vast majority of the work performed on the Lock 19 job was not the kind of work traditionally claimed by union carpenters." Even if true, the Company completely ignores the evidence, discussed above, that McKenzie did not hire union carpenters on the Keokuk icebreaker project to perform "the kind of work traditionally claimed by union carpenters." That was not his criterion for employing workers to assist the two operating engineers and the boilermaker on that project. McKenzie admitted that he hired only union carpenters to assist them, and not members of the Iron Workers and Laborers unions, because "I don't need to have a whole bunch of guys [from different unions] claiming work."

Moreover, McKenzie admitted (Tr. 184) that the "hardest part of that project was getting the ice out of the work area. Huge amounts, I mean, ice bigger than the quantity in this room." He later admitted (Tr. 227–231) that various jobs performed by the nonunion replacements on the project were the same or similar to jobs on the Keokuk icebreaker project and unskilled jobs "that we all did."

Instead of assigning union journeymen Patterson and Spiekermeier—whom the General Counsel alleged (Tr. 45–46, 186; GC Exh. 18 p. 1) would have been assigned—McKenzie reassigned nonunion replacements David Clawson and Tod Schenck, who were working on the Keokuk icebreaker project before the December 7, 1995 layoff during the winter shutdown (Tr. 173–176.) There is no evidence that the replacements had any previous experience in performing the so-called "vast majority" of work that was not "the kind of work traditionally claimed by union carpenters."

I reject, as unfounded, the Company contention that union employees Patterson and Spiekermeier should be denied backpay for the work performed by Clawson and Schenck.

2. Work in Quad Cities area

The Company contends in its brief (at 19) that because of the distance of about 100 miles from the Local 410 hiring hall in Fort Madison to the Crescent Bridge project in the Quad Cities and because other projects in that area continued for another year and a half, "none of the discriminatees [unlawfully dis-

charged union carpenters] would have been willing to make that 200-mile-plus daily round trip to work on [the] projects."

The Company ignores President McKenzie's testimony at the Federal district court trial in the ERISA case (Tr. 19–21; GC Exh. 10, pp. 125–126) that he would have "used these [four discharged union members] on the Crescent Bridge job"—indicating that he had expected them to be willing to work there. The Company also ignores Local 410 Business Agent Decker's credited testimony (Tr. 268) that his members work "Quite a bit" in the Quad Cities and "all over where work is to be had"—indicating a shortage of work for his members in the geographic jurisdiction of Local 410.

The Company's records (Tr. 202, 232; GC Exh. 18 pp. 3–4) show that the Company's nonunion crew (Michael Dooley, John Rea, Randall Rea, Tod Schenck, Jamey Sweeden, and Andrew Weir), who worked on the Keokuk icebreaker project, were reassigned first on November 1, 1996, to the Santa Fe bridge project in Fort Madison and then on November 23, 1996, to the Crescent Bridge job in Davenport, Iowa—indicating their willingness to work that far away.

Regarding work on the Company's other projects in the Quad Cities area, I note that the Company introduced in evidence an incorrect Chronology of Work Projects (R. Exh. 2). That exhibit indicates that upon conclusion of the Crescent Bridge job in Davenport on March 26, 1997, the work resumed on the Rock Island Arsenal job in the Quad Cities area on June 22, 1997. To the contrary, the Company's records (R. Exh. 18 p. 4) shows that the work resumed on April 7, 1997 (the week ending April 12), with nonunion replacements who had worked on the Keokuk icebreaker, Santa Fe, and Crescent Bridge projects.

The Company has attempted no explanation for nonunion replacements being willing to work that distance from where they were hired, but not the discharged union members.

In its brief the Company also ignores Local 410 Business Agent Decker's credited testimony that when contractors in his area do work in the jurisdiction of other locals in Carpenters' Heartland Regional Council, "they take local people" with them and pay the fringe benefits back in his area—indicating that the Local 410 members continue to work under Local 410's collective-bargaining agreement when working in the Quad Cities area. The Company also ignores Decker's credited testimony that in practice, there was no "limitation on carpenters . . . working at a different area within the regional council." (Tr. 268.)

The Company conjectures in its brief (at 19) that "the discriminatees would have needed to apply to Local 166 or work out an arrangement with Local 166 to permit them to work in the Quad Cities territory." In doing so, the Company ignores the lack of evidence that any Local 410 member employed by either the Company or any other contractor in the area had ever been required to join or get a permit from Local 166 to work in the Quad Cities area. It was only when the Company sent nonunion replacements into the Quad Cities area that Local 166 claimed jurisdiction over work performed by the Company's employees.

The Company does concede in its brief (at 19 fn. 8) that Fred Arnold (one of the four discharged union employees) did work in the Quad Cities area for Allied Construction after his discharge, but contends—without any record support—that Arnold performed only "a small amount of work in that area. . . . [for a] brief stint." The Company's own evidence (R. Exhs. 5–6) shows that after Arnold was discharged, he worked for Allied Construction a total of about 40 months (nearly 3½ years). When asked if this work was in the Quad Cities, he merely answered, "Some of it was, some of it was local" and "I don't know" for what period of time in the Quad Cities (Tr. 133, 135). The Company offered no evidence to support its contention that Arnold worked in the Quad Cities area only "a small amount" or for only a "brief stint."

The Company further contends in its brief (at 20) that "the discriminatees' actions indicate that they had no interest in working regularly in the Quad Cities." It cites the irrelevant evidence that they failed to look for work and register with Local 166 and the unemployment office in the Quad Cities—outside the jurisdiction of Local 410, where they were registered both at the union hiring hall and at State unemployment offices (R. Exhs. 5, 7, 9). The Company contends that a "vast majority" of their work after their November 1, 1995 discharge was within 30 miles of the Local 410 hiring hall in Fort Madison, "although they did travel as far as 50 to 60 miles to one or two jobsites within the Local 410 geographic jurisdiction."

There is no relevant evidence that the discharged Local 410 members would have refused employment in the Quad Cities area if offered by the Company.

I find reject this unsupported defense.

3. Demolition work on Crescent bridge job

The Company contends in its brief (at 21–22) that during the demolition work on the Crescent Bridge job from January 6 to February 5, 1997, the discharged union carpenters should not be awarded backpay because it "simply was not carpenters' work" and "the Company would not have hired carpenters" to perform the work.

As found above, however, that was not the criterion for McKenzie's hiring employees to assist the operating engineers and boilermaker in performing the work on the Keokuk icebreaking project. He had hired only union carpenters—and not ironworkers or laborers—because "I don't need to have a whole bunch of guys [from different unions] claiming work." Moreover, nonunion replacements were already assisting the operating engineers (including operating engineer Jerry Russell, hired December 15, 1996, Tr. 195; R. Exh 12) and the boilermaker who were performing the demolition work that began in December 1996 (Tr. 237–239, 241, 248).

On November 23, 1996, the Company (after completing the Keokuk icebreaker project on November 1 and the Santa Fe job in Fort Madison on November 23) had reassigned its crew of six nonunion replacements to work on the Crescent Bridge job (GC Exh. 18 pp. 3–4). For about the first 2-1/2 or 3 weeks they assisted the operating engineer and boilermaker in moving the Company's barges and construction equipment, behind a towboat, upriver through the ice to the Crescent Bridge and in repairing the ice damage to the boat and barges. The Company then began performing the demolition work, but little progress

was made because of the "bitterly cold" weather, forcing a shutdown on December 18, 1996. (Tr. 203, 237–239, 256–257.)

On December 14, 1996, as discussed below, President McKenzie raised from $12 to $15 the wage rate of nonunion replacements Daniel Oliver, Randall Rea, Jamey Sweeden, and Andrew Weir, who were then assisting the operating engineer and boilermaker who were performing the demolition work.

When the demolition work resumed—not on January 6 (as incorrectly shown on the Chronology of Work Projects, R. Exh. 2), but on January 13, 1997 (the week ending January 18, GC Exh. 18 p. 4)—nonunion replacements Daniel Oliver, Randall Rea, and Jamey Sweeden, as well as Andrew Weir, continued assisting the work of the operating engineers and boilermaker, who were operating the "clam shells, excavators and big, heavy equipment" (Tr. 203–204).

Although a company exhibit (R. Exh. 12) shows that Weir continued working until July 12, 2000, his earnings since the December 18, 1996 weather shutdown are not included for backpay purposes in the compliance specification (GC Exhs. 17, 18), because he joined the Laborers union (Tr. 194). The stipulated methodology for calculating gross backpay was to exclude "employees who are affiliations with other unions" (Tr. 46–47). When asked what the Laborers rate of pay was, McKenzie testified he thought $18, "something like that" (Tr. 201).

Regarding the type of work the three nonunion replacements and laborer Weir were performing, McKenzie testified that "there's a lot of ice formation when you do this operation," that the crew was "cleaning the barges off" to prevent machines from slipping off the barges, that "there's a lot of debris around there [that would fall off] and they're continually shoveling this ice and debris back into the river." McKenzie testified that this work required no particular skills, "Just muscle and eyesight." (Tr. 241–242.)

Thus, there is no evidence indicating that the discharged union members would not have continued to be employed in January 1997 to assist the operating engineers and boilermaker who were performing the demolition work. Nonunion replacements had already been assisting them in December, and the work merely involved laborers' work, which the discharged union carpenters had also performed on the Keokuk icebreaker project.

I reject, as unfounded, the contention that "no backpay or benefit contributions should be awarded to the discriminatees" for the unskilled work performed by the nonunion replacements during the January demolition work through February 5, 1997.

4. Backpay after addendum to operating engineers' contract

a. The contention

The Company contends in its brief (at 22–25):

> The Discriminatees should not be awarded backpay or back benefits for the period from February 6, 1997 through the end of the Crescent Bridge Project [in March 1997] because the Discriminatees would not have worked on the project after the Company assigned the work to the operating engineers union.

Concerning this contention, the Company points out (at 5) that when President McKenzie was asked to use Local 166 carpenters on the job, the "Company decided not to use Local 166 carpenters and, on February 6, 1997, the Company assigned the work instead to Local 150 (Rock Island) of the operating engineers union, a union with which the Company had a longstanding (more than 30 years) relationship."

b. The work assignment

As found, on December 12, 1996, after the Company began attempting to perform demolition work on the Crescent Bridge job, Heartland Regional Council Business Agent Delcourt was advised that the Company's replacement employees were nonunion. Delcourt sought on behalf of Carpenters Local 166 to apply the Company's adopted 1996–2001 contract between the AGC of Illinois and the Brotherhood of Carpenters (GC Exh. 15) to the work being performed by the nonunion replacements.

As part of President McKenzie negative response, he took four actions:

(1) On December 13, 1996, he attempted to terminate prematurely the Company's May 1, 1994 to April 30, 1997 contract with the Carpenters' District Council on behalf of Local 410, under which the Company had paid $18.65 an hour to union foreman Donald Patterson, $17.65 to union members Fred Arnold and Mark Spiekermeier, and $8.33 to union apprentice Steven Perry (Tr. 49–50). The letter to Local 410 Business Agent Jim Decker (GC Exh. 2a) read:

> By this letter, McKenzie Engineering Co. terminates any and all agreements with Carpenters Local 410 and its affiliates as of the above date.

(2) On December 14, 1996, when four nonunion replacements being paid $12 an hour (Daniel Oliver, Randall Rea, Jamey Sweeden, and Andrew Weir) remained on the Crescent Bridge job, McKenzie raise their wage rate to $15 an hour, retroactive to the beginning of the week, December 9 (GC Exhs. 17 pp. 1, 4 and 18 p. 4).

(3) After the December 18, 1996, weather shutdown, McKenzie employed as a member of the Laborers union one of the nonunion replacements, Weir, who continued working until July 12, 2000 (Tr. 194; R. Exh. 12).

(4) On February 6, 1997, according to McKenzie, he signed an addendum to Operating Engineers Local 150's dredge maintenance agreement, to remain in effect until the end of the Crescent Bridge project, which was completed by March 26, 1997 (R. Exh. 2).

Without explanation, the Company failed to produce and place in evidence the addendum. Local 150's dredge maintenance agreement is in evidence (GC Exh. 12), but the only addendum to the agreement in evidence (GC Exh. 13) is the one McKenzie signed a year earlier on January 8, 1996. There is no evidence to corroborate McKenzie's testimony that the February 6, 1997 addendum was actually in writing.

c. McKenzie's conflicting testimony

At the compliance hearing, President McKenzie gave different versions of what the addendum provided. On direct examination—in the absence of the addendum in evidence—he testi-

fied in response to the following questions by company counsel (Tr. 204–205):

> Q. [BY MR. LAUTH] Mr. McKenzie, is it accurate that as of February 6, 1997, the remaining work at the Crescent Bridge project was assigned to the operating engineers?
>
> A. Yes it was.
>
> Q. And, you signed a contract with the operating engineers at that time?
>
> A. Yes, I did.
>
> Q. Was the remainder of the work on that project paid at the Operating Engineers' Contract rate?
>
> A. Correct, yes.
>
> Q. And, for all of the remaining work on that project, did you make all benefit contributions that were required under the Operating Engineers' Contract.
>
> A. Yes, I did.

In fact, the evidence shows that the work assisting the operating engineers and boilermaker, who were performing the remaining construction work after February 6, 1997, was assigned to the nonunion replacements, Daniel Oliver, Randall Rea, and Jamey Sweeden, and to Andrew Weir, who had joined the Laborers union (Tr. 248–249). The work performed by the three nonunion replacements continued to be paid at their previous nonunion rate, which McKenzie had raised from $12 to $15 an hour on December 14, 1996. All benefit contributions required by the Operating Engineers contract were not paid. It is stipulated that the contributions were made for only one of the three nonunion replacements, Sweeden. (Tr. 258, 264; GC Exhs. 17 p. 2 and 18 p. 4.)

McKenzie then gave conflicting testimony on cross-examination.

McKenzie claimed that he paid nonunion replacement Randall Rea $12 an hour after signing the Operating Engineers addendum on February 6, 1997. But when asked about the $15 rate (shown on GC Exh. 17 p. 1–2), he admitted (Tr. 258), "That's correct. They were given a raise" (but in December, not on February 6).

Although McKenzie admitted that Rea's wage rate went back down to $12 an hour in April 1997 (after completion of the Crescent Bridge job in March), McKenzie claimed, "I wouldn't know," when asked if Rea ever joined the Operating Engineers. He next testified, "I don't believe he did" and "That's my understanding" that he did not. Only then did McKenzie admit knowledge that Rea did not work as an operating engineer. He admitted that Rea worked as a permit employee under the Operating Engineers' contract. (Tr. 258–259.)

Earlier at the compliance hearing (Tr. 251), before McKenzie made this admission, he testified that when he signed a contract with the Operating Engineers on February 6, 1997, Sweeden became an apprentice operating engineer and was still paid $12 an hour.

This testimony is clearly false. Sweeden was not paid $12 an hour on the Crescent Bridge job after February 6. The record (GC Exhs. 17 pp. 1–2, 4 and 18 p. 4) shows that like Daniel Oliver and Randall Rea, Sweeden's nonunion wage rate had been raised from $12 to $15 an hour on December 14, 1996. Also, Sweeden's $15 rate shows that McKenzie's claim that he hired Sweeden as an apprentice operating engineer was likewise false. Instead, like Oliver and Rea, Sweeden worked as a permit employee under the Operating Engineers contract—not as either an apprentice or a member of the Operating Engineers.

The $15-an-hour nonunion earnings of Oliver, Rea, and Sweeden are shown on the company records (GC Exhs. 17 p. 2, 4 and 18 p. 4, on which the stipulated compliance specification of gross backpay is based) for the weeks ending December 14, 1996, to March 1, 1997. Their earnings on the Crescent Bridge job (as well as the earnings of then laborer Weir) for the weeks after March 1, however, are not shown on GC Exhs. 17 and 18 for backpay purposes.

The apparent reason is that when the Company made benefit contributions in March to the Operating Engineers on behalf of Sweeden, it undoubtedly reported (as McKenzie falsely testified) that Sweeden was an apprentice member of the Operating Engineers. I note that there is no provision in the Local 150 contract for an apprenticeship program, for apprenticeship rates, or for making benefit contributions on behalf of apprentices (GC Exhs. 12, 13).

As found, the stipulated methodology for calculating gross backpay was to exclude "employees who had affiliations with other unions" (Tr. 46–47). Evidently, the Company's record of the report to the Operating Engineers benefit fund after March 1, 1997, that Sweeden was a member of the Operating Engineers (although false) was considered sufficient to show on the company records in March that the three replacements "had affiliations" with Local 150.

The Company makes no attempt to reconcile McKenzie's different versions of what the February 6, 1997 addendum provided. Whether the addendum was oral, or in writing and not produced at the hearing, the evidence is clear that the arrangement was for nonunion replacements Oliver, Rea, and Sweeden to continue performing the work for the remainder of the Crescent Bridge job, with no change is their nonunion $15 wage rate, and for the Company to make benefit contributions on behalf of only one of them, Sweeden, whom McKenzie falsely claimed to be an apprentice operating engineer being paid $12 an hour.

Thus, the nonunion replacements remained on the job after the Company purportedly "assigned the work" to the Operating Engineers on February 6, 1997. There was no change in their conditions of employment, except that the Company in March made fringe benefit contributions on behalf of one of the replacements, Jamey Sweeden, to the Health and Welfare and Pension Fund (GC Exh. 12 p. 1) of the Operating Engineers, although he was not a member.

d. Irrelevant defense

In support of its defense that no "backpay or benefit contributions" should be awarded to the discriminatees after the Company "assigned the work" on February 6, 1997, to the Operating Engineers, the Company contends in its brief (at 22) that the Federal circuit court "has held that the Company properly assigned the remainder of the work" on that date to the Operating Engineers, and the union members' "claim for back-

pay and back fringe benefits is therefore barred by the doctrine of res judicata."

To the contrary, as found above, the circuit court's decision in the subsequent ERISA case, as well as the Board's decision in the subsequent *McKenzie 2* case, is irrelevant to the issues in this compliance proceeding.

I reject the Company's unsupported defense.

5. Union members working after expiration of Local 410 contract

The Company contends in its brief (at 26–27):

> The Discriminatees should not be awarded backpay for work performed by the Company *in Local 410's jurisdiction* after April 30, 1997 because the Company's contract with Local 410 expired and the Discriminatees would not have worked for the Company on a nonunion basis. [Emphasis added.]

As worded, this defense is *not* that the unlawfully discharged union members would have refused to work for the Company on a nonunion basis after April 30, 1997. It does not refer to them working after that date in the Quad Cities, *outside* the jurisdiction of Local 410.

The apparent reason is that at the time Carpenters Local 410 contract expired on *April 30, 1997,* carpenter journeymen Fred Arnold Jr., Donald Patterson, and Mark Spiekermeier were all unemployed. Arnold was unemployed from *February 3 until May 27, 1997* (R. Exh. 7). Patterson was unemployed from *November 25, 1996 until July 3, 1997* (R. Exh. 5). Spiekermeier was unemployed from *December 17, 1996 until May 27, 1997* (R. Exh. 9). The Company's own exhibits show that they were seeking work (R. Exhs. 5, 7, 9), and there is no evidence that the union members would have refused to work for the Company after April 30, 1997, if the Company had offered them employment.

The Company is instead contending in its brief (at 26–27) that the union members would have refused to work for the Company on a long-term job over a year later after the April 30, 1997 contract expiration and after completion of the Company's Phillips Oil job in Bettendorf, Iowa, one of the Quad Cities, during the week ending May 30, 1998 (Tr. 211; GC Exh. 18 p. 5; R. Exh. 2).

The Company's next job, which was in Local 410's jurisdiction, was its second project at the Union Electric Dam in Keokuk, a long-term job nearer the employees' homes. The project began the week ending June 6, 1998, and was still in progress over 2 years later at the time of the compliance hearing on November 6–7, 2000 (Tr. 209; GC Exh. 18 p. 5–14).

Of course, it is merely a conjecture that the discharged union employees would have refused an offer to work nonunion on that long-term project.

In making this contention, the Company assumes that in the absence of its unlawful discharge of the union members on November 1, 1995, McKenzie would still have sent Local 410 the Company's February 13, 1997 letter (GC Exh. 2b) terminating the Local 410 contract on its April 30, 1997 expiration date, instead of following its previous longstanding practice of operating as a union contractor. The Company also assumes that after the assumed expiration of the Local 410 contract, it would not have assigned the union members to work in the Quad Cities area, contrary to the above findings.

I find that in the absence of supporting evidence and particularly because of the shortage of work for the union journeymen in the jurisdiction of Local 410 after their unlawful discharge (R. Exhs. 5, 7, 9), the Company has failed to prove that the discharged union members would have refused to work long-term for the Company on a nonunion basis.

I therefore reject this unsupported defense.

6. Calculating union members' backpay

The Company contends in its brief (at 27):

> Even if the Discriminatees should be awarded backpay for work in the Local 410 jurisdiction after the expiration of the contract, the backpay should not be calculated at contract rates.

The Company's own exhibit (R. Exh. 14) shows that it was paying as high as $18 to $20 to the following nonunion replacements: Richard Murphy ($18 and $20), Keith Sowers ($18, $18.50, and $19), and Anthony Stevenson ($18, $19, and $19.50). Furthermore, President McKenzie testified (Tr. 201) that $18, "something like that" was the wage rate being paid members of the Laborers union, employees Marvin Tripp (Tr. 219), Steward (Tr. 194), and Andrew Weir (Tr. 194).

Yet the Company contends in its brief (at 27–28) that "any backpay for this period [after the April 30, 1997 contract expiration] should be calculated using the average wage rate that the Company paid its nonunion employees—$15.80 per hour," citing Respondent Exhibit 14. That exhibit shows that the nonunion wages included wage rates as low as $7, $8, $10, $12, $12.50, and $13.50 an hour.

Thus, the Company is contending that the wage rate used to determine backpay for the experienced union journeymen ($18.65 for Donald Patterson who was employed as foreman, and $17.65 for Fred Arnold Jr. and Mark Spiekermeier) should not be calculated in relation to the higher wage rates being paid experienced nonunion replacements and members of the Laborers union. Instead, the Company is contending that the backpay rate must be lowered by averaging in the wages of inexperienced, unskilled, and less skilled nonunion replacements.

In view of the evidence that the Company was paying as high as $18 to $20 for nonunion replacements and had begun to employ Laborers at a rate higher than the Carpenters' journeyman rate, I find that the Company has failed to show that the $18.65 rate for the journeyman foreman (Tr. 74–75) and the $17.65 rate for the other union journeymen were unreasonable. Therefore those rates in the Compliance Specification "cannot be declared to be arbitrary or unreasonable in the circumstances involved." *NLRB v. Brown & Root, Inc.*, 311 F.2d 447, 452 (8th Cir. 1963).

I reject this company defense.

7. Limiting backpay to average tenure

The Company contends in is brief (at 12–17):

> The Discriminatees should only be awarded backpay and back benefit contributions for a period of 31 weeks

[from November 1, 1995 until June 6, 1996], which is the average tenure of a nonsupervisory employee at McKenzie Engineering.

That is, the Company is contending that the backpay for the unlawfully discharged union members should end over a year before Local 410's contract expired on June 30, 1997.

The Company cites no authority to support such an extreme position of limiting backpay to average tenure, under the existing circumstances. The position fails to take into account the very high turnover of the lower paid nonunion replacements. In fact, most of the nonunion replacements worked very few weeks and 11 of them worked only 1 week or less, including 5 who worked only 1 day, Ronald Berry, Steven Cullen, Brian Holvet, Riordan, and Todd Simons (Tr. 196, 218–220; GC Exh. 17; R. Exh. 12).

The Company erroneously contends in its brief (at 10–11) that the General Counsel's seeking "more than five years of backpay for the discriminatees" is based on "the assumption that each of the discriminatees would have worked for [the Company] on each of its projects for the entire five year period." To the contrary, the General Counsel seeks backpay only for the union members who would have worked on the Company's jobs (GC Exhs. 17, 18; R. Exh. 2).

Of course, there is no certainty, even considering the poor employment opportunities for the union employees in the area after their discharge, that they would have accepted all assignments to work (GC Exhs. 17, 18; R. Exh. 2)

(a) on the Keokuk icebreaker project at the Union Electric dam for the weeks ending *November 8 to December 21, 1995*,

(b) on the Army Corps of Engineers Lock 19 project for the weeks ending *February 24 to March 16, 1996*,

(c) on the Keokuk icebreaker project for the weeks ending *March 23 to November 2, 1996,*

(d) on the Santa Fe job in Fort Madison for the weeks ending *November 9 to November 23, 1996,*

(e) on the Crescent bridge job in Davenport (in the Quad Cities) for the weeks ending *November 30 to December 21, 1996,*

(f) on the Crescent bridge job for the weeks ending *January 18 to March 1, 1997*,

(g) on the Rock Island (Quad Cities) Arsenal job for the weeks ending *April 12, 1997 to March 21, 1998* (the weeks ending July 5, 1997 to March 21, 1998 being omitted from the Compliance Specification, without explanation),

(h) on the Phillips Oil job in Bettendorf (in the Quad Cities) for the weeks ending *May 9 to May 30, 1998*, and

(i) on the second Keokuk project at the Union Electric dam for the week ending *July 7, 1998 through* the date of the compliance hearing on *November 6–7, 2000*.

On the other hand, none of the discharged union members was given an opportunity to work on the projects, and there is no way to positively determined whether they would have refused to accept assignments on the projects.

By hiring only replacements since the discharges, the Company created uncertainty whether the union members would have performed the available work on the Company's projects if they had not been discharged. It is well established that in a backpay proceeding when uncertainty exists, the uncertainty should be resolved in favor of the wronged party rather than the wrongdoer. *Cobb Mechanical Contractors*, 333 NLRB 1168 (2001); and *Atlanta Limousine, Inc.*, 328 NLRB 257 fn. 3 (1999).

I reject the Company defense that the unlawfully discharged union members should be awarded backpay and benefits for only 31 weeks, which is less that 1 year.

Regarding adequacy of the remedy, I note that the stipulated methodology for calculating gross backpay—excluding the earnings of "employees who had affiliations with other unions"—has precluded the inclusion of earnings, for backpay purposes, of members of the Laborers union who, like the nonunion replacements and also the union members before their unlawful discharge, were employed to assist the operating engineers and boilermaker.

After Carpenters Local 166 sought to apply its contract to work being performed in December 1996 by the nonunion replacements on the Crescent Bridge job, as found, the Company began employing members of the Laborers union as replacements. For example, Andrew Weir worked as a nonunion replacement from August 18 to December 18, 1996 (the week ending December 21, 1996). He joined the Laborers union and worked until July 12, 2000—a total of 206 weeks (nearly 4 years) until July 12, 2000. His earnings while working as a Laborers member have not been included in the compliance specification. (GC Exh. 17; R. Exh. 12.)

Thus, the General Counsel does not seek any remedy for the worked performed by members of the Laborers union after December 21, 1996.

8. Efforts to seek interim employment

The Company contends in its brief (at 29–31) that union journeyman Mark Spiekermeier was unemployed a total of 12 months in a 16 month period, showing that he "did not make reasonable efforts to seek interim employment" to "adequately mitigate his damages."

In making this contention the Company ignores evidence indicating a shortage of work also for the two other discharged union journeymen.

Spiekermeier was unemployed for *5 1/2 months* from *December 29, 1995 to June 14, 1996*. During that time, journeyman Donald Patterson was unemployed over *4 months*, from *January 17 to May 24, 1996*. Journeyman Fred Arnold Jr. was unemployed *2 1/2 months from January 22 to April 9, 1996*. (R. Exhs. 5, 7, 9.)

Spiekermeier's next long period of unemployment was for *5½ months* from *December 16, 1996 to May 27, 1997*. Patterson was unemployed (*1 1/2 months* longer) for *7 months* from *November 25, 1996 to July 3, 1997*. Arnold was unemployed for *3 3/4 months* from *February 3 to May 27, 1997*. (R. Exhs. 5, 7, 9.)

There is no contention that journeymen Patterson and Arnold were not diligently seeking work, despite their long periods of unemployment.

In the meantime, Spiekermeier applied regularly at both Carpenters Local 410 hiring hall and the State unemployment office. Being referred by Local 410, he worked on a short job with Graham Construction before his first long period of unemployment. He worked for employer Willard Jackson until his next unemployment, which lasted *5 weeks*, and for Allied Construction until his second long period of unemployment. After that, he worked twice for Allied Construction, and also worked for employers Menefee Drywall, Frank Millard, and Greystone. After that he worked for Allied Construction for a whole year before working for Lankford Construction and Allied Construction for short times, then for Allied Construction for most of 2000.

The Company failed to prove that Spiekermeier was not diligently seeking work or that he refused any available employment. Clearly, after the General Counsel had shown the gross amount of backpay due Spiekermeier, the Company did not sustain it burden "to establish facts which would negative the existence of [the employer's] liability to [the] employee or which would mitigate that liability." *NLRB v. Brown & Root, Inc.*, 311 F.2d 447, 454 (8th Cir. 1963).

I reject the Company unsupported defense.

9. Court ruling in ERISA case

Concerning the Compliance Specification for the payment of fringe benefits, the Company again contends in its brief (at 33–35) that the General Counsel's request for back fringe benefit contributions is barred by res judicata and should be barred.

To the contrary, as found above, the Eighth Circuit Court's decision in the ERISA case is irrelevant to the issues in this compliance proceeding.

10. Backpay and back benefits for all employees

As discussed above, the Board (326 NLRB at 474) ordered that the Company both (a) offer full reinstatement to the discharged Local 410 members and make them whole for lost earnings and other benefits, to remedy the Section 8(a)(3) violations, and (b) honor the Local 410 agreement, "including paying contractual wage rates, making contractually required contributions to the fringe benefit funds" and "make whole *all* [emphasis added] . . . and fringe benefit funds" to remedy the Section 8(a)(5) violations.

The Company contends in its brief (at 35, 37):

> Backpay should not be awarded to all of the [nonunion replacements] and all of the discriminatees because such an award will result in overpayment by [the Company].
>
> . . . .
>
> It is inappropriate to order the Company to pay backpay to all of the discriminatees and all of the [nonunion replacements] because, absent the illegal discrimination, many of the [replacements] would not have worked for the Company at all. Instead, the award of backpay to the [replacements] should be limited to those employees who would have been hired *even if* the discriminatees were working for the Company. Thus, in a week in which [the Company] employed six [replacements] on its crew, backpay should be awarded to the four discriminatees and two [replacements].

To the contrary, the Board has long held that when an employer unlawfully discharges union employees and replaces them with nonunion replacements, the employer is required to give backpay not only to discharged employees but also to all the nonunion replacements. *Blumenfeld Theatres Circuit*, 240 NLRB 206, 207, 218–219 (1979), enfd. mem. 626 F.2d 865 (9th Cir. 1980).

Relying on *Blumenfeld*, the Board held in *Ad-Art, Inc*., 290 NLRB 590, 590–591, 611 (1988), that "[a]ll replacements" performing the work must be made whole, ruling that "Determination of the identity of any replacement employees who are not included in the arbitrator's remedy [granting backpay to the union employees] may be made in the compliance stage of this proceeding."

The Board went further in *J.R.R. Realty Co.*, 301 NLRB 473, 473–474 fn. 2, 481–482 (1991), enfd. mem. 955 F.2d 764 (D.C. Cir. 1992), cert. denied 506 U.S. 829 (1990). In that case the Board ruled that the employer must not only give backpay to the discharged union employees and all the nonunion replacements, but must also make contributions to the benefit funds for "six positions," even though "there were at any time no more than four replacements employed." Six union employees had been employed, and the union contract provided that before reducing its force, the employer "must provide the Union with 4 weeks' written notice."

11. Calculating nonunion replacements' backpay

Article 15, section 2 of the Local 410 contract provides that when four or more journeymen are employed, one must be an apprentice "when available," and that the assignment of apprentices "shall be determined and governed by the Joint Apprentice Committee" (GC Exh. 4 p. 11).

Although the Company had no apprentice program, none of the nonunion replacements was an apprentice, and no apprentices were available, the Company contends in its brief (at 37–39) that backpay for some of the replacements should be calculated at an apprentice rate, because several of them had "apprentice-level" skills. This, of course, does not qualify them as apprentices. Therefore, the Local 410 contract required that all the nonunion replacements of the unlawfully discharged union members must be paid at the journeyman rate.

I reject this contention as unfounded.

CONCLUSIONS OF LAW

Having stipulated that the methodology used in calculating the compliance specification was reasonable and that the General Counsel has met the burden of showing the gross backpay, the Company has failed to meet its burden of establishing facts in this compliance proceeding that would negative the existence of its liability for

1. The unlawful discharge on November 1, 1995, of members of Carpenters Local 410 in violation of Section 8(a)(3) and (1) of the Act, failing to offer them reinstatement and make them whole for lost earnings and other benefits, and failing to make contributions on their behalf to the fringe benefit funds.

2. Not honoring the Local 410 collective-bargaining contract in violation of Section 8(a)(5), failing to pay the nonunion replacements the contractual wage rate and to make them whole, and failing to make contributions on their behalf to the fringe benefits funds.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[1]

ORDER

The Respondent, McKenzie Engineering Co., Fort Madison, Iowa, its officers, agents, successors, and assigns, shall make the following payments in accordance with the National Labor Relations Board's Decision and Order in 326 NLRB 473, 474 (1998), plus interest on all payments as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987):

(a) Make whole discharged union employees Fred Arnold, Donald Patterson, Mark Spiekermeier, and Steven Perry by paying the following amounts for backpay that accrued from November 1, 1995, through the first 3 weeks of October 2000, and additional backpay that will have accrued from then until the Respondent offers them full and immediate reinstatement (excepting Perry who died October 21, 1999), and make whole the fringe benefit funds by paying them the total fringe benefits that accrued from November 1, 1995, through April 30, 1997:

Employee	Backpay	Fringe Benefits
Fred Arnold	$8,757.56	$4,264.87
Donald Patterson	64,106.43	5,951.94
Mark Spikermeier	36,298.02	5,425.87
Steven Perry	5,711.10	0.00

(b) Make whole the following employees hired as nonunion replacements by paying them the following amounts for backpay and make whole the fringe benefit funds by paying them the total fringe benefits:

Employee	Backpay	Fringe Benefits
Ronald Berry	$45.20	$18.16
John Briggs	2,535.10	1,011.29
David Clawson	0.00	506.21
Lester Click	392.20	335.96
Steven Cullen	45.20	18.16
Michael Dooley	6,257.90	2,472.03
Brian Holvet	45.20	18.16
Jack Landes	477.00	404.06
Carl Leggett	226.00	90.80
James Leggett	135.60	54.48
Michael McCarl	406.80	163.44
Daniel Oliver	6,739.20	3,066.77
John Rea	1,685.61	620.85
Randall Rea	8,713.01	3,744.37
Tod Schenck	7,925.66	3,674.00
Kevin Siemens	1,247.24	489.19
Todd Siron	45.20	18.16
Jamey Sweeden	7,505.99	3,352.79
Andrew Weir	3,974.21	1,629.86

[1] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.